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93 1946 JUN - 6 1994

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JAMES GOODEN,

Petitioner,

vs.

MICHAEL V. NEAL, RANDY TINSMAN, PAUL BARNETT and DENNIS DAVIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves a jury verdict for James Gooden, a lieutenant in the Illinois Department of Corrections. The jury found that Gooden had been retaliated against and constructively discharged for reporting suspected criminal conduct on the part of the warden and his staff at a state prison to the State's Attorney. The District Court's judgment on the verdict was reversed by a divided panel of the Court of Appeals for the Seventh Circuit.

1. Must a "mixed motive" jury instruction, shifting the burden of proof to an employer to show that it would have reached the same employment decision even in the absence of protected conduct, be given in <u>all</u> cases involving allegations of wrongful termination in retaliation for constitutionally protected conduct, even when the employer denies having a mixed motive and the issue tried is whether illegal or legal motives, but not both, prompted the termination?

2. Does Rule 16 of the Federal Rules of Civil Procedure give the trial court authority to refuse to instruct the jury on an issue not presented in the Pretrial Order, and which is not supported by the evidence and arguments presented at trial?

PARTIES TO THE PROCEEDING

All parties to the proceeding in the United States Court of Appeals for the Seventh Circuit that is the subject of this Petition for Writ of Certiorari are listed on the caption page and on page 1 of this Petition.

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IN THE
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JAMES GOODEN,
Petitioner,
v.
MICHAEL V. NEAL, RANDY TINSMAN,
PAUL BARNETT and DENNIS DAVIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner James Gooden respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Seventh Circuit entered on February 7, 1994, is reported at *Gooden v. Neal, et al.,* 17 F.3d 925 (7th Cir. 1994), and is reprinted in Appendix A hereto; the Judgment entered on that same date is reprinted in Appendix B hereto. The Amended Judgment and Order of the Court of Appeals entered on February 25, 1994, is reprinted in Appendix C hereto. The Order of the Court of Appeals denying petition for rehearing entered on March 7, 1994, is reprinted in Appendix D hereto.

The Amended Judgment of the District Court entered on May 23, 1991, is reprinted in Appendix E hereto. The Order of the District Court on Defendants' Motion for Judgment [N.O.V.] or in the Alternative for a New Trial is reprinted in Appendix F hereto.

JURISDICTION

Petitioner brought this action in the United States District Court for the Central District of Illinois, Danville Division, under 42 U.S.C. § 1983. The District Court had jurisdiction over such an action pursuant to 28 U.S.C. §§ 1331 and 1343. After a jury trial, the District Court entered judgment in favor of petitioner.

On respondents' appeal, the Court of Appeals for the Seventh Circuit on February 7, 1994, entered a judgment and opinion reversing the judgment of the District Court. On February 25, 1994, the Court of Appeals entered an amended judgment and order. On March 7, 1994, the Court of Appeals entered an order denying petitioner's petition for rehearing.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment I

Congress shall make no law . . . abridging the freedom of speech . . . .

42 U.S.C. Section 1983

§ 1983. Civil Action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Federal Rules of Civil Procedure, Rule 16

(See Appendix G hereto)

STATEMENT OF THE CASE

1. **Introduction**. This case presents the Supreme Court with the opportunity to clarify lingering confusion and correct error among the Circuit Courts regarding the allocation of burdens of proof in employment discrimination/retaliation cases. This Court has addressed the issue at least five times, in various contents, in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981), and *Mt. Healthy City Bd. of Ed. v. Doyle,* 429 U.S. 274 (1977), and more recently in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) and *St. Mary's Honor Center v. Hicks,* 113 S.Ct. 2742 (1993). However, important questions remain unanswered, especially in free speech cases.

As Judge Lay pointed out in his dissent below, the Seventh Circuit majority decision misunderstood the precedents of this Court, believing that a "mixed motive," *Mt. Healthy*-type jury instruction must be given in all cases

in which a plaintiff is discriminated or retaliated against because of his constitutionally protected speech, even if "mixed motives" were not in fact involved in the case (Appendix A-8.) In this approach, the Seventh Circuit is seriously at odds with the above precedents of this Court and other Courts of Appeal. The effect of the Seventh Circuit's decision is to shift the burden of persuasion to the employer in every First Amendment case.[1]

The Seventh Circuit majority also believed that this Court's precedents in *McDonnell Douglas, Burdine, Price Waterhouse,* and *St. Mary's* do not apply to employment cases involving protected speech. (Appendix A-5.) This raises the issue, not yet explicitly addressed by this Court, of whether all employment discrimination/retaliation cases should be treated the same with regard to standards of proof, whatever their statutory basis. Judge Lay, in his dissent, eloquently demonstrated that as a matter of logic and policy, these disparate lines of cases should be reconciled and a single standard adopted. Certiorari in this

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[1]Ironically, had the District Court given the "mixed motive" jury instruction requested by respondents, this would only have increased respondents' burden of proof at trial. The Seventh Circuit reversed for a reason that could only be harmless error under Rule 61 of the Federal Rules of Civil Procedure. Now, however, it is petitioner who suffers the burden of being deprived of his verdict and having to relitigate the entire case at considerable cost.

Petitioner would also like to suggest to this Court that it consider the possibility of summary reversal of the Seventh Circuit's decision on the grounds of harmless error as an alternative to granting certiorari. Petitioner succeeded at trial under the more rigorous standard of the District Court's jury instruction, and a new trial under a "mixed motive" standard would only make petitioner's burden easier, and the trial pointless.

case will permit the Court to give the District and Appellate Courts the guidance they need on this important issue.

This case also raises an important issue never before addressed by this Court regarding the authority of a District Court under Rule 16 of the Federal Rules of Civil Procedure to limit the issues to be tried to what has been raised in the Pretrial Order. Here, the issue of "mixed motives" was never presented in the Pretrial Order, the proofs at trial, or anytime before the instruction conference. There has been a tremendous proliferation of appeals on this question, and the Circuit Courts are divided on this issue that arises in many cases across the spectrum of substantive law. Certiorari will promote the reduction of the number of these appeals by establishing guidelines.

2. Petitioner's Allegations of Retaliation for Whistleblowing. Petitioner James Gooden, a career law enforcement officer employed by the Illinois Department of Corrections at its Danville, Illinois correctional facility, brought an action under 42 U.S.C. § 1983 against Warden Michael Neal and his assistants seeking redress for constructive discharge. Gooden alleged that he was removed from his position as lieutenant in charge of Internal Affairs, subjected to a nine-month campaign of harassment, and constructively discharged by defendants in retaliation for the exercise of his constitutionally protected First Amendment rights. Gooden had (as required by his job) vigorously investigated allegations of misconduct by inmates and staff, discovered the wardens' attempts to cover up official corruption, and reported these incidents to the State's Attorney.

The nine-month harassment campaign against Gooden started with repeated reassignment and shift changes and a

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series of seven disciplinary actions and investigations on trumped-up charges. It ended with Gooden's assignment to a new "outer perimeter" post created specially for him (and abolished within days after his constructive discharge). Gooden, formerly one of the key officers at the prison, was reduced to walking unarmed around the outside of the prison in the cold and snow, searching for nonexistent terrorists, when the prison already had a continuous external patrol and five guard towers manned 24 hours a day by armed guards. Gooden was not allowed inside the prison even for meals, coffee breaks, or to get a winter coat, and no one could talk to Gooden without having to file a report. Gooden was finally forced to quit on January 15, 1988.

Dr. Charles Newman, plaintiff's expert,[2] testified that nothing in Danville's records supported removing Gooden from Internal Affairs; Gooden's written evaluations had always rated his performance as good or excellent and he had received numerous awards and commendations for exceptional performance. Dr. Newman testified that the outer perimeter assignment was the most ludicrous assignment he had ever seen and was totally incomprehensible except as the last stage in getting Gooden to leave the institution. (R.462-65, 471-72.) One of the Department of Corrections investigators called in to investigate Gooden on false charges also testified that it was clear that the wardens created the outer perimeter post to induce Gooden to resign. (R.750-52.) Gooden was replaced with a series of substitutes who had no talent,

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[2]Dr. Newman is professor emeritus at Penn State University, past president of the American Society of Criminology and founding editor of Criminology.

training, or liking for the post and who referred few, if any, matters to the State's Attorney.

3. Respondents' Denial of Retaliation or "Mixed Motives" and Allegations of Legitimate Reasons for Actions Against Petitioner. In response, respondents denied any retaliation against Gooden and claimed that all of their actions were proper administrative decisions motivated purely by a nondiscriminatory reason: Gooden was (they claimed) emotionally unstable and thus ineffective in his position.

At trial, respondents claimed that Gooden's reports to the State's Attorney did not motivate them in any way in the actions that they took against him, including removing him from Internal Affairs or assigning him to the outer perimeter post. Respondents did not care that Gooden was going to the State's Attorney, because they had nothing to hide and any citizen has the right to go to the State's Attorney. Respondents testified that prior to October 1987 they were not even aware that Gooden was reporting to the State's Attorney; thus they could not have been retaliating against him when they removed him from Internal Affairs in April 1987 or brought him up on various charges thereafter.

4. Theories at Trial and Respondents' Late Request for a "Mixed Motive" Jury Instruction. The District Court allowed both sides great liberty in the presentation of theories and evidence, preferring to let it "all hang out." (R.16, 18, 62.)

Neither side ever raised an issue in the pleadings or the proofs that respondents had a "mixed motive" for their

actions against Gooden. Instead, the issue as stated by respondents and incorporated in the Pretrial Order was:

> 3. *whether the actions* taken by defendants toward plaintiff were because of his alleged protected activity or for legitimate business reasons and within their authority.

(Pretrial Order, R.Doc. 48.) Respondents denied any "mixed motive" in their opening and closing statements, and no issue of "mixed motive" was raised in respondents' motion for directed verdict or their renewed motion for directed verdict. (R.771, 1179.) Indeed, even on appeal respondents confirmed this approach to the case, stating in their opening brief to the Seventh Circuit: "Plaintiff presented a theory of retaliation to the jury and defendants presented a theory of acts based on proper administrative discretion." (Brief of defendants-appellants, here respondents, at 3:11-13.) Fifteen months late, one day before the end of trial and after the close of plaintiff's case-in-chief, respondents for the first time requested a full *Mt. Healthy* "mixed motive" jury instruction.[3] This untimely filing violated Central District of Illinois Rule 2.11(E)(6) and the Pretrial Order.

5. The District Court's Ruling on the Requested "Mixed Motive" Jury Instruction. The District Court refused defendants' belated request for a "mixed motive" instruction on the basis that defendants had not tried the case on a mixed-motive basis, and the issue was not supported by the pleadings or proofs in the case (R.1196,

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[3]R.Doc. 60, at No. 15; R.938, 1192-98. *See* Appendix H hereto for the text of respondents' proposed jury instruction.

1197.) The District Court stated that the case clearly was governed by the *McDonnell Douglas/Burdine* paradigm, under which only the ultimate issue of retaliation went to the jury. (R.817-19.) The District Court charged the jury on the issue of whether or not plaintiff had met his ultimate burden of proof of retaliation.[4]

The District Court's order denying defendants' post trial motions contrasted Gooden's theory of a "whistle blower" reporting wrongful conduct to the State's Attorney against defendants' theory of a "trouble maker" and a "personnel problem." (Appendix B-1.) "The jury believed Gooden and didn't believe the defendants." (Appendix B-2.)

6. Reversal by a Divided Panel of the Seventh Circuit. On respondents' appeal, a divided panel of the Seventh Circuit ruled that the District Court should have given a *Mt. Healthy* burden-shifting "mixed motive" jury instruction. "When . . . plaintiff says that the adverse decision was based on speech, and the defendant says that the decision was based on something else, the jury should be told what to do if it concludes that the employer had both motives. *Mt. Healthy* gives the jury that essential information." (Appendix A-6, emphasis added.)

The Court of Appeals also read *Mt. Healthy* as establishing obligatory standards for litigation under the First Amendment that are distinct from the standards established by the Supreme Court for other kinds of employment litigation, such as Title VII cases under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). (Appendix A-5.)

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[4]R.Doc. 62, at 14; R.1298-99. *See* Appendix I hereto for the text of the District Court's jury instruction.

7. The Dissent of Judge Lay. Judge Lay of the Eighth Circuit, sitting by designation, filed a lengthy dissent in which he stated that the majority had misapplied the Supreme Court's rulings in *Mt. Healthy, Price Waterhouse, Burdine,* and *McDonnell Douglas,* misunderstood the distinction between "mixed motive" and "pretext" cases, and reached an "untenable" result at odds with the considered opinions of other Circuit Courts of Appeal.

Judge Lay, who had been involved with these issues since 1972, when he filed a concurring opinion in *Green v. McDonnell Douglas Corp.*, 463 F.2d 337 (1972), found multiple degrees of unfairness in the majority's "unprecedented" result: defendants reaped gain by claiming error in the trial court's refusal to instruct on a factual premise not involved in the case; and employers will now, in every case, be forced to assume the burden of proving that their employment decisions were not based on their employee's exercise of their First Amendment rights. (Appendix A-8-9.) Judge Lay also noted and analyzed the illogic of distinguishing First Amendment employment cases from other discrimination employment cases, when the true distinction was between "mixed motive" and "pretext" cases. (Appendix A-12-17.) The Dissent stated that the District Court's refusal to give the "mixed motive" instruction was consonant with a basic principle of law: judges do not instruct on legal principles where factual proof to support the claim is absent. (Appendix A-17-18.)

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit's Decision That a *Mt. Healthy* "Mixed Motive" Jury Instruction Must Be Given in *All* Free Speech Cases, Notwithstanding the Employer's Denial of any "Mixed Motive," Is in Conflict With the Decisions of This Court and Other Courts of Appeal

A. The Seventh Circuit's Decision Misapplies the Precedents of This Court and Puts an Improper Burden on Employers in All Free Speech Cases to *Disprove* Retaliation

The District Court properly refused respondents' belated request for a "mixed motive" instruction because it understood the import of the Supreme Court's precedents on the burden of proof in employment discrimination cases and saw the issues clearly enough to avoid a mechanical application of the *Mt. Healthy* "mixed motive" analysis where it was not warranted. In contrast, as Judge Lay's dissent points out, the Seventh Circuit majority's unprecedented decision misapplies Supreme Court rulings, which distinguish between "pretext" and "mixed motive" cases, to create a new and untenable rule:

> Assuming the majority's unprecedented ruling withstands further review, employment cases involving the First Amendment will require employers, in every case, to assume the burden of proving that their employment decisions were <u>not</u> based on the exercise of their employees' First Amendment rights.

(Appendix A-8.)

This Court's involvement is essential to clarify this important issue of proof in cases that will continue to plague the District and Appellate Courts.

1. The *Mt. Healthy* Analysis Does Not Apply to This or to Every First Amendment Case

The Supreme Court recognizes that not all cases involve a "mixed motive" on the part of an employer, and thus distinct standards have arisen for "pretext" cases as opposed to "mixed motive" cases. The difference between a "pretext" and a "mixed motive" case was discussed in *Price Waterhouse v. Hopkins*. A "pretext" case is one in which there was either unlawful motivation or lawful motivation, but not both; a "mixed motive" case is one in which there are both lawful and unlawful motivations. *Id.*, 490 U.S. at 247 (plurality opinion), and 260 (White, J. concurring).

McDonnell Douglas created an exception to the normal order of proof specially for employment discrimination cases, because plaintiffs are hard put to produce direct evidence of intentional discrimination. ("As should be apparent, the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." *Price Waterhouse,* 490 U.S. at 271 (O'Connor, J. concurring.)) *Mt. Healthy* in a sense went on to create a further exception to the traditional burden analysis. In *Mt. Healthy,* the Supreme Court was faced with another special problem in which it needed to protect a public employer from an employee who was about to be fired and who attempted to retain his job by also exercising his right of free speech.

The *Mt. Healthy* Court did not wish to "place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Mt. Healthy,* 429 U.S. at 285. The Court reasoned that such an employee "ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record." *Id.,* 429 U.S. at 286.

Judge Lay's dissent discussed the majority's misunderstanding of the rationale and ruling of *Mt. Healthy.* (Appendix A-10-12.) Indeed, the facts of *Gooden v. Neal* are entirely distinguishable from those of *Mt. Healthy,* because there was no evidence whatsoever that Gooden was attempting to hold onto a job in which his tenure was shaky by exercising his right of free speech. Rather, Gooden's record at the institution was unblemished, and the retaliation and harassment by his supervisors only started after Gooden communicated his findings of corruption to the State's Attorney.

Petitioner suggests that the confusion shown by the Seventh Circuit regarding the application of the *Mt. Healthy* "mixed motive" standard after the decision in *Price Waterhouse* may be explained in part by the fact that this Court has not yet discussed the true heart of the "mixed motive" matter. The essential question comes down to the more fundamental psychological basis of motivation: in what circumstances is it possible for an employer to have "mixed motives," and in what circumstances is it impossible that there be more than one motive?

In determining whether or not to rehire an employee, as in *Mt. Healthy*, an employer may well have mixed motives,

one of which may be improper. But it is difficult to see how an employer who is alleged to have conducted an intentional nine-month campaign of harassment in retaliation for the employee's protected conduct, leading to constructive discharge of the employee, could be said to have anything but an improper motive. "Mixed motives" are impossible in such a case by virtue of the nature of the action taken by the employer, and the state of mind that such action would require. The alleged harassment, retaliation, and discharge either happened or they didn't. If they didn't, the employer had one state of mind and motivation; if they did, then the employer had quite another state of mind and motivation. Such states of mind cannot coexist. Either improper or proper motive, but not both, were at play.

The only issue in this case concerns motive. *See, Caro v. Aponte-Roque*, 878 F.2d 1, 2-3 (1st Cir. 1989) (Breyer, J.). As Chief Justice Rehnquist wrote, "In short, the district court must decide which party's explanation of the employer's motivation it believes. . . . The law often obliges finders of fact to inquire into a person's state of mind." *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). In *Gooden*, the trier of fact was properly asked to determine whom to believe: the employer, who alleged a proper motive, or the employee, who alleged retaliation.

2. The Role of the Trial Court Under *Mt. Healthy* and *McDonnell Douglas/Burdine*.

As Justice Brennan stated in *Price Waterhouse*, "[a]t some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives." *Price Waterhouse v. Hopkins*, 490 U.S. at 247,

n. 12.[5] And as Justice O'Connor stated: "Once all the evidence has been received, the court should determine whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it." *Id.*, 490 U.S. at 278-79 (O'Connor, J. concurring). The District Court in *Gooden* did precisely that. Judge Baker refused respondents' last-minute request for a "mixed motive" instruction because defendants had not tried the case on a "mixed-motive" basis, and the issue was not supported by the pleadings or proofs in the case. (R.1196, 1197.)[6] Indeed, defendants specifically denied "mixed motives" at all times before and during trial. (*See Oxman v. WLS-TV*, 12 F.3d 652, 658 (7th Cir. 1993), in which a different panel of the Seventh Circuit upheld rejecting a "mixed motive" analysis on this same basis.) The District Court and the parties saw this as a clear "pretext" case, and the Court charged the jury to decide whether or not plaintiff had met his ultimate burden of proof of retaliation.

The Seventh Circuit's decision, however, established the remarkable rule that the jury is to decide what issues are to be tried in a free speech discharge case. Even if the parties, the pleadings, and the Court frame the issues to

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[5] Following Justice Brennan's statement, the Court of Appeals for the Eighth Circuit has recently held that *Price-Waterhouse* requires the District Court to make a finding whether the case is or is not a mixed motives case. *Sargent v. Paul*, 16 F.3d 946, 949 n.7 (8th Cir. 1994), citing *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 996 F.2d 200, 202 (8th Cir. 1993).

[6] Judge Baker stated: "I don't disagree with all those hypothetical discussions of the law. Given proper facts and evidence they might have application, but I rule in this case they do not." (R.1195-96)

exclude any claim of "mixed motives," under the Seventh Circuit's ruling the jury may nevertheless decide that this issue is involved in the case and proceed to decide it: "When, however, the plaintiff says that the adverse decision was based on speech, and the defendant says that the decision was based on something else, the jury should be told what to do if it concludes that the employer had both motives. *Mt. Healthy* gives the jury that essential information." (Appendix A-6, emphasis added.)

Judge Baker explained his rejection of the *Mr. Healthy* burden-shifting instruction on the basis that the case as tried was squarely governed by the *McDonnell Douglas/Burdine* paradigm. Under *McDonnell Douglas/Burdine,* the framework of presumptions and defendant's burden ultimately drops out of the case, and plaintiff retains the ultimate burden of proof of discrimination. *Burdine,* 450 U.S. at 252-55; *McDonnell Douglas,* 411 U.S. at 804. Judge Baker's analysis follows this framework precisely:

> [W]hen we go to the jury, the plaintiff has the burden of persuading the jury that a substantial or motivating factor in his discharge, if it was a discharge, was his protected speech. That's plain and simple. You don't have any of this other . . . . It's a classic *McDonnell Douglas* paradigm . . . . Once we get to the jury, that paradigm is forgotten. It's gone. The plaintiff has the burden to persuade the jury that a motivating substantial factor in his discharge, if they believe he was discharged, was the discriminatory action. . . . The jury is going to have to weigh and say, well, what they did was legitimate or it wasn't.

(R.817-19.)

The role that the trial judge then plays in narrowing and framing the issues that are to be determined by the jury was first set out in *Burdine*:

> [A]ssessing the burden of production helps the judge determine whether the litigants have created an issue of fact to be decided by the jury. . . . the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.

Burdine, 450 U.S. at 256, n. 8, emphasis added.

Under *McDonnell Douglas* and *Burdine,* although not explicitly stated, it is evident that the issue of whether plaintiff meets his initial burden of establishing a prima facie case, and whether the employer meets its burden of production of a non-discriminatory reason for its actions, are for the trial judge to decide before the matter ever reaches the jury. The jury then decides a single simple issue: whether or not plaintiff has met his "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff." *Burdine,* 450 U.S. at 253. The jury in *Gooden* was asked to decide precisely this: whether or not respondents retaliated against petitioner.

That the jury only decides the ultimate question of whether or not plaintiff has proven intentional discrimination was further clarified in *St. Mary's Honor Center v. Hicks,* 113 S.Ct. 2742 (1993):

> If, on the other hand, the defendant has succeeded in carrying its burden of production, the *McDonnell*

> *Douglas* framework--with its presumptions and burdens--is no longer relevant. . . . The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture. [*Burdine*, 450 U.S.] at 255, 101 S.Ct., at 1094-1095. The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" . . . *id.*, at 253, 101 S.Ct., at 1093.

St. Mary's, 113 S.Ct. at 2749, emphasis added.

Rather than simply lumping this case in with *Mt. Healthy* because they were both First Amendment cases, Judge Baker properly resisted giving a *Mt. Healthy* jury instruction that had no basis in the facts or issues of the case and instead instructed the jury to determine whether or not plaintiff had met his ultimate burden of proof of retaliation. This is the only proper approach under the Court's decisions in *Price Waterhouse* and *St. Mary's*.

B. The Seventh Circuit's Insistence That Free Speech Cases Always Mandate a "Mixed Motive" Instruction is Contrary to Logic and to the Rulings of This Court, Other Courts of Appeal, and Other Panels of the Seventh Circuit

Judge Lay's dissent noted that the majority "interprets *Mt. Healthy* and free speech cases to be distinct from all other employment cases under Title VII or § 1983. This kind of categorization does not comport with logic." (Appendix A-12.)

Judge Lay demonstrated that although *Mt. Healthy* arose in the context of the First Amendment, it has not been limited to First Amendment situations. The same "mixed motive" analysis developed in *Mt. Healthy* was applied in *Price Waterhouse,* a Title VII case involving gender discrimination; in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.,* 429 U.S. 252, 270, n. 21 (1977), a decision handed down on the same day as *Mt. Healthy* involving a claim of racial discrimination brought under the Fourteenth Amendment and the Fair Housing Act; and in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 403 (1983), an action brought under the National Labor Relations Act. (Appendix A-12-13, 15.)

Conversely, the Supreme Court has extended the *McDonnell Douglas* framework beyond Title VII cases: *St. Mary's,* 113 S.Ct. at 2747, n. 1, assumed that the *McDonnell Douglas* framework is fully applicable to actions under 42 U.S.C. § 1983 alleging racial discrimination in employment; and *Patterson v. McLean Credit Union,* 491 U.S. 164, 186 (1989), applied the framework to claims under 42 U.S.C. § 1981.

The D.C. Circuit and the Second Circuit, unlike the Seventh Circuit, have recognized that both the "pretext" analysis of *McDonnell Douglass/Burdine* and the "mixed motive" analysis of *Mt. Healthy/Price Waterhouse* are fully applicable to both civil rights and First Amendment constitutional claims depending upon the facts of the case, and a *Mt. Healthy* instruction is only appropriate where "mixed motives" are present. *See, American Postal Workers Union, AFL-CIO v. United States Postal Service,* 830 F.2d 294, 311, n. 28 (D.C. Cir. 1987) (First Amendment case in which pretext, and not mixed motive

was involved); *Simpson v. Federal Mine Safety & Health Review Commission*, 842 F.2d 453, 461, n. 7 (D.C. Cir. 1988) (Ginsberg, J.) (as in *A.P.W.U.*, defendant did not make a "mixed motive" contention); *Howard v. Senkowski*, 986 F. 2d 24 (2d Cir. 1993) (mixed motive analysis applied in race discrimination case); and *Holo-Krome Co. v. NLRB*, 954 F.2d 108 (2d Cir. 1992) (*Mt. Healthy* does not apply in a pretext situation). *See also, Church of Scientology v. City of Clearwater*, 2 F.3d 1514, 1529-1530 (11th Cir. 1993); *U.S. Information Agency v. Krc*, 989 F.2d 1211, 1214, 1215 n.* (D.C. Cir. 1993).

Judge Lay perceived that "the relevant distinction is between mixed-motive and pretext cases, not between discrimination involving the First Amendment and all other types of discrimination." (Appendix A-14.) Judge Lay explored the implications of treating First Amendment cases differently than other discrimination cases:

> The majority's decision to shift the burden of persuasion to the employer, in <u>every</u> First Amendment case, is insupportable. It is incomprehensible why free speech cases will always place the burden of proof on the employers to show the legitimacy of discharge or other adverse employment decisions. Yet when race, gender, age, or nationality enter into the employment decision, the burden of persuasion will not be placed on the employer unless the plaintiff can prove that the employer had a mixed motive in reaching its decision. Under the majority's approach, *Mt. Healthy* ends up benefitting a plaintiff by placing him or her in a better position than other employees, simply because the claim made relates to the First Amendment rather than some other protected status. As a further consequence of today's decision, it seems that in all First Amendment

> cases the employee is relieved of the burden of showing pretextuality; the traditional burden of proof as to causation will have already been transferred to the employer at the pleading stage.

(Appendix A-16-17.)

Given the trend of Supreme Court and Court of Appeals decisions starting with *Price Waterhouse,* it is clear that either a "pretext" or a "mixed motive" analysis may apply to any constitutional violation or discrimination case, depending upon the facts of each case. First Amendment cases are not uniquely exempt from these dual tests, because the common issues in all such cases are the defendant's state of mind, and the shifting burden of proof. There is no principled basis to distinguish free speech, racial discrimination, or sex discrimination cases on this issue. (See *McMillian v. Svetanoff*, 878 F.2d 186, 190-191, n. 3 (7th Cir. 1989), in which Judge Flaum of the Seventh Circuit suggested this very analysis.)

At work here is the development of a "common law" of discrimination and constitutional violations. *McDonnell Douglas,* followed by *Burdine,* initiated this "common law" with the "pretext" analysis. *Mt. Healthy* and *Village of Arlington Heights* added to this "common law" the "mixed motive" analysis. *Price Waterhouse,* followed by *St. Mary's,* attempted to merge the two lines of analysis and clarify in which cases each approach is to be taken. The majority opinion here is wrong because it refuses to acknowledge the clear development of two distinct tests for factually different cases. Certiorari will allow this Court to finish the picture by establishing that First Amendment employment cases may be governed by either a "pretext" or

a "mixed motive" analysis, depending on the facts of each case.

II. The Seventh Circuit's Decision Is in Direct Conflict With Six Circuits Vesting Wide Authority in the District Court To Decline To Instruct on an Issue Not Raised in the Pretrial Order

A. The Need for Guidance On an Issue Never Before Addressed by This Court

There has been an explosion of appeals regarding the authority of a District Court to limit the issues to be tried to those raised in the Pretrial Order. This issue has never before been addressed by the Supreme Court. Six Circuits have held that a District Court does not commit reversible error in declining to instruct a jury in an issue not raised in the Pretrial Order. The Seventh and Ninth Circuits have held to the contrary. Intervention by the Supreme Court is necessary to establish guidelines which will affect a tremendous number of cases involving jury instructions, witnesses, theories of recovery and damages, and trial exhibits.

In this case, the majority reversed a District Court for not charging a jury on an issue not raised in the Pretrial Order. The rejected instruction was tendered 15 months late, one day before the jury instruction conference at the end of the trial, and after the District Court had already ruled on motions for directed verdicts. The Pretrial Order and trial presentation defined the issues in the case as either retaliation for constitutionally protected conduct or legitimate business activity (R. 48 at 27, 30), but not both; and defendants denied any retaliatory motive in the opening statement, trial testimony, and closing arguments. There is

no evidence in the record that defendants had the requisite "mixed motive" necessary to support the rejected untimely instruction.

Despite six conflicting Circuits, the Seventh Circuit's own unbroken line of cases under Rule 16, and the presence of a lengthy and powerful dissent, the majority declined to discuss, analyze, or even acknowledge any issue regarding new matters being raised contrary to the Pretrial Order. The Seventh Circuit opinion now allows defendants to "double dip": argue in pretrial and at trial that retaliation had no part in the defendant's motive, but if that doesn't work, claim a "mixed motive" at the end of the case. Worse, the Seventh Circuit allows the jury to decide if there was a mixed motive, even if the parties do not argue it. (Appendix A-6.) This is all contrary to both the spirit and letter of Rule 16.

Certiorari should be granted in this case because the issue of the District Court's authority under Federal Rules of Civil Procedure Rule 16 arises in a tremendous number of cases across the spectrum of substantive law, and the Circuit Courts are divided on this issue. *See,* generally, *Annotation, Jones, Walter, Jr., Consideration or Submission at Trial, Under Rule 16 of Federal Rules of Civil Procedure, of Issues Not Fixed for Trial in Pre-Trial Order,* 11 ALR Fed. 786-807 (1972). Even a brief review of the pocket supplements of *Wright & Miller* and *Moore's Federal Practice* indicates a tremendous proliferation of appeals on the issue of the District Court's authority over theories, issues and evidence not listed in the Pretrial Order. The increased caseload on this issue is so great that West Publishing Company has in its 1993-1994 pocket supplement to the *Federal Practice Digest (4th)* created a new category for this issue (*See, Federal Practice Digest,*

Federal Civil Procedure, Sec. 1935.1.) This issue is likely to continue to arise in the future and in fact multiply. Certiorari will promote the reduction of the number of these cases by establishing guidelines.

B. Six Circuits Oppose The Position Taken By the Seventh Circuit

The majority opinion is in conflict with six circuits that have held that it is not reversible error to decline to instruct a jury on an issue not raised in the Pretrial Order. *See, Senra v. Cunningham,* 9 F.3d 168, 170-171 (1st Cir. 1993). (District Court did not abuse discretion in declining to grant untimely instruction tendered just before the close of evidence contrary to the Pretrial Order); *Glisman v. AT&T Technologies, Inc.,* 827 F.2d 262, 267 (8th Cir. 1987) (No reversible error committed in age discrimination case where District Court declines to instruct on issue not in Pretrial Order and not supported by evidence); *Laird v. Shell Oil Co.,* 770 F.2d 508, 510-511 (5th Cir. 1985) (In action for negligence and strict liability, District Court did not err in declining to instruct jury on borrowed-servant theory; issue was not raised in the Pretrial Order or at trial, and was contrary to issues developed in counsel's opening statement, closing argument, and was unsupported by the evidence); *Trinity Carton Co. v. Falstaff Brewing Corp.,* 767 F.2d 184, 192 note 13 (5th Cir., 1985), *cert. denied,* 475 U.S. 1017 (1986) (District Court correctly declined to instruct on issues amounting to affirmative defenses where these issues and supporting facts were not in Pretrial Order); *Sil-Flo, Inc. v. SFHC, Inc.,* 917 F.2d 1507, 1512-1514 (10th Cir. 1990) (District Court did not err in declining to instruct jury on conspiracy and "aiding and abetting" theory; these issues were not fairly advanced in the Pretrial Order and there was

a lack of evidence to support the instructions); *Santiago v. Lykes Bros. Steamship Co.,Inc.*, 986 F.2d 423, 427 (11th Cir. 1993) (District Court did not abuse discretion by declining to instruct on continuing tort theory not raised in Pretrial Order); *Derewecki v. Penn. Railroad Co.*, 353 F.2d 436, 444-445 (3rd Cir. 1965) (District Court did not err in declining to instruct on contributory negligence which was not raised in the Pretrial Order).

C. The Seventh Circuit's Position Is In Conflict With Its Own Unbroken Precedent

Until *Gooden* was decided, there had been an unbroken line of cases in the Seventh Circuit uniformly affirming the broad authority of a District Court to allow or not allow theories, issues, and evidence to be raised at trial that were not raised in the Pretrial Order. *See, Sadlowski v. Bombardier, Ltd.*, 539 F.2d 615, 620-21 (7th Cir. 1976) (unlisted witness); *Ed Houser & Enterprises v. General Motors Corp.*, 595 F.2d 366, 372 (7th Cir., 1978) (unlisted witnesses and exhibits); *Syvock v. Mil Boiler Mfg. Co.*, 665 F.2d 149, 158-9 (7th Cir. 1981) (unlisted witness); *Spray-Rite Service Corp. v. Monsanto,* 684 F.2d 1226, 1245-46, (7th Cir. 1982) (unlisted witness); *Erff v. Markhon Industries, Inc.*, 781 F.2d 613, 618 (7th Cir. 1986) (undisclosed theory of recovery); *Kuba v. Ristow Trucking Co., Inc.*, 811 F.2d 1053, 1055 (7th Cir. 1987) (undisclosed affirmative defense); *Todds v. Corporate Life Ins. Co.*, 945 F.2d 204, 209 (7th Cir. 1991) (undisclosed damage issue).

D. Support for the Seventh Circuit

The Seventh Circuit's decision in this case is supported directly by the Ninth Circuit and indirectly by other Circuits. *Stewart v. Ragland,* 934 F.2d 1033, 1042 (9th Cir.

1991), held that a District Court abused its discretion in failing to charge a jury on an exemption of gas and oil interests from state regulation even though it was not in the Pretrial Order. Although not jury instruction cases, the decisions of three circuits indirectly support the Seventh, holding that District Courts abused their discretion in declining to allow issues to be raised that were not disclosed in the Pretrial Order. *See, Manbeck v. Ostrowski,* 384 F.2d 970, 975-977 (D.C. Cir. 1967), 11 ALR Fed. 771 (District Court erred in not allowing issue of privilege to be raised in libel trial even though this issue was not raised in Pretrial Order); *Howard v. Kerr Glass Co.,* 699 F.2d 330, 332-333 (6th Cir. 1983) (District Court erred in not permitting party to amend Pretrial Order to assert breach of warranty claim); *United States v. First National Bank of Circle,* 652 F.2d 882, 886-887 (9th Cir. 1981) (District Court erred in awarding judgment on theory not advanced in Pretrial Order.)

E. The 1983 Amendments to Rule 16

The 1983 Amendments to Rule 16 state that "formulation" as well as "simplification" of issues is a goal of the Pretrial Conference, and that the Pretrial Order should be modified only to prevent manifest injustice. (Rule 16, Appendix G-1-2; *See, Moore's Federal Practice,* Sec. 16.01(6) at 16-19.) In this case the defendants never requested a modification of the Pretrial Order. The 1983 Amendments were intended to vest wide authority in the District Court over pretrial and trial proceedings:

> The reference in Rule 16(c)(1) to "formulation" is intended to clarify and confirm that court's power to identify the litigable issues . . . . Counsel bear a substantial responsibility for assisting the court in

identifying the factual issues worthy of trial. If counsel fail to identify an issue for the court, the right to have the issue tried is waived. (Appendix G-2,3, emphasis added.)

F. No Abuse Of Discretion by the District Court Was Shown

The Seventh Circuit did not make any showing that the District Court abused its discretion. Plaintiff had every right to know in advance of trial what defendants' contentions were regarding whether the actions taken were for retaliation or business purposes ("pretext"), "mixed motive," or some other combination.

In this case the District Court did not abuse its discretion. A "dual motive" closing argument would have shifted the focus of the case 180 degrees after the evidence was closed. Allowing such a dramatic change in the case at such a late stage would have prejudiced plaintiff and destroyed the orderly and efficient conduct of the case, an occurrence that Rule 16 was specifically designed to avoid. *See, Senra v. Cunningham,* 9 F.3d 168, 170-171 (1st Cir. 1993). As in *Senra,* there was no showing that tardily filed instructions pertained to a matter that was not foreseeable at the time set in the Pretrial Order. Paradoxically, the defendants had an extra burden under the rejected instruction and in fact benefited from the District Court's refusal to instruct as requested. Ironically, it is petitioner who now suffers the consequences of the Seventh Circuit's reversal.

The Circuits are divided on the extent and scope of a District Court's authority to limit the trial to what is defined in the Pretrial Order. There are no uniform standards

defining an abuse of discretion by the District Court under Rule 16 or the scope of appellate review. Given the 1983 amendments to Rule 16 and the proliferation of appeals, the Supreme Court should grant certiorari to review this issue for the first time.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should be issued to the United Sates Court of Appeals for the Seventh Circuit to review the questions presented by this Petition.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals
Entered on February 7, 1994

In the

United States Court of Appeals

For the Seventh Circuit

No. 92-2524

JAMES GOODEN,

Plaintiff-Appellee,

v.

MICHAEL V. NEAL, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the Central District of Illinois, Danville Division.
No. 87-2460—**Harold A. Baker**, *Judge.*

ARGUED NOVEMBER 29, 1993—DECIDED FEBRUARY 7, 1994

Before POSNER, *Chief Judge*, and LAY† and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* As James Gooden tells the story, the truth was more than the warden could bear. Promoted to lieutenant and placed in charge of the internal affairs unit of the Danville Correctional Center in August 1986, Gooden started digging. His performance won accolades, including an "employee of the month" award while he was a member of the unit but not yet its head. The praise-filled evaluations continued after his promotion.

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† Hon. Donald P. Lay, of the Eighth Circuit, sitting by designation.

Yet after turning up abuses by fellow guards, such as their performing favors for gang leaders (presumably for compensation), he found his superiors unwilling to listen. Despite enough information to start a criminal investigation of corruption—information he supplied to the local prosecutor—nothing happened within the prison. Instead of putting out the fire, the warden switched off the alarm. One morning in March 1987 Gooden reported for work at internal affairs only to be told to "turn in his keys, take his name plate and not come back." Reassigned to ordinary guard duty, he did not take the hint. In January 1988 he was assigned to perimeter duty and required to trudge around the prison in snow and cold; when not marching, he was posted to an unheated guard tower. After the assistant warden refused to provide him with a winter coat for his tour in the tower, another correctional officer refused to let him back into the prison, showing him a memo forbidding his entry into the prison unescorted. Gooden quit.

As Warden Neal tells the story, James Gooden was more than anyone could bear. Promotion to a desk job left Gooden at sea, edgy, and defensive, a textbook example of the Peter Principle. He saw wrongdoing in the most innocuous events and committed the bureaucrat's cardinal sin of barging into another employee's jurisdiction despite a direct order to respect the division of authority. He got so overwrought that he couldn't take a joke. Another guard circulated a memo in Gooden's name canceling Christmas. Gooden became livid and started testing all of the prison's typewriters in an attempt to identify the prankster—as if he were trying to use the Pumpkin Papers to find out whether Whittaker Chambers was telling the truth about Alger Hiss. So the warden returned Gooden to the last job he had done well: guard. Normal rotation had him marching through sleet.

The tales have some overlap: Gooden does not deny the typewriter incident, and the warden concedes telling Gooden to keep his nose out of some areas where, Gooden says, he smelled a rat. By and large, however, both the

stories and their legal implications are diametrically opposed. If Gooden is right, and he was constructively discharged for discovering and speaking to the prosecutor about criminal conduct by other guards, then the persons responsible for these events violated the first amendment.† If Warden Neal is right, and Gooden is an irascible busybody who roiled the prisoners and hampered the work of other employees, then sending Gooden to the prison's equivalent of Siberia (thus inducing him to quit) is more supportable—for, even if the methods the warden used were poor public administration, a constructive discharge motivated by considerations other than speech does not violate the first amendment. Cf. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993); *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 658-60 (7th Cir. 1991) (en banc); *Benzies v. Illinois Department of Mental Health*, 810 F.2d 146 (7th Cir. 1987).

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† Defendants do not deny that reports of crime by public employees are speech on a matter of public concern within *Pickering v. Board of Education*, 391 U.S. 563 (1968). We therefore need not decide whether, and if so how far, the concession is correct. Cf. *Feldman v. Bahn*, No. 93-1908 (7th Cir. Dec. 29, 1993). The claim of official immunity, which has succeeded in many *Pickering* cases, see *Greenberg v. Kmetko*, 922 F.2d 382 (7th Cir. 1991); *Benson v. Allphin*, 786 F.2d 268 (7th Cir. 1986), comes too late. Although it is an affirmative defense, which ordinarily is raised and resolved before trial, we have held that district judges may act favorably on immunity claims raised for the first time in midtrial by motion for directed verdict (now a motion for judgment as a matter of law, see Fed. R. Civ. P. 50(a)), see *Rakovich v. Wade*, 850 F.2d 1180, 1204 (7th Cir. 1988) (en banc), but have not excused defendants from the procedural requirements of such motions. Defendants failed to list immunity as an issue in the pretrial order, taking it off the trial agenda. What is more, a contention rooted in the facts of a case may not be raised for the first time after trial; it must be raised during trial. A motion properly made during trial may be "renewed" after trial. Fed. R. Civ. P. 50(b). Defendants did not rely on immunity before or during trial; the subject first arose in post-trial practice. That is too late. E.g., *McGee v. Bauer*, 956 F.2d 730, 733-34 (7th Cir. 1992); *Thronson v. Meisels*, 800 F.2d 136, 139 (7th Cir. 1986); *McKinnon v. Berwyn*, 750 F.2d 1383, 1387-90 (7th Cir. 1984).

As the district judge saw matters, the jury in this action under 42 U.S.C. §1983 had to choose between two stories. Gooden was either a whistleblower forced out because of his speech or a frazzled bureaucrat in over his head. There was at least one more possibility: a little of each. Defendants' lawyer asked for a charge based on *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). He wanted the judge to tell the jury that, even if the defendants retaliated for Gooden's speech, they prevail if they would have forced his resignation for reasons unrelated to his speech. Counsel planned to make a dual-motive argument in closing. The judge declined to give a *Mt. Healthy* instruction and told the jurors that if Gooden's speech was a "motivating factor" they were to return a verdict in his favor. The jury did so, awarding damages of $375,000. The judge later added almost $200,000 in attorneys' fees. In response to a post-trial motion the judge wrote: "If the protected speech was a motivating factor and a constitutional violation, the fact that the defendants would have done what they did anyway, without being motivated by the protected speech, is not germane to the question of liability." Although defendants relied heavily on *Mt. Healthy*, the judge did not cite or discuss that opinion.

The district court's conclusion that an employer violates the first amendment when speech is a "motivating factor" even if "the defendants would have done what they did anyway" tracks an approach the Supreme Court disapproved in *Mt. Healthy*. The district court in that case concluded that "[i]f a non-permissible reason, e.g., exercise of First Amendment rights, played a substantial part in the decision not to renew [employment]—even in the face of other permissible grounds—the decision may not stand". 429 U.S. at 284. The Court replied:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in [an employment] decision . . . could place an employee in a better position as a result of the exercise of constitutionally protected conduct than

> he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision . . . and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.

Id. at 285-86. The Court devised a burden-shifting approach: if the employee shows by a preponderance of the evidence "that his conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the [employer's] decision" then the burden shifts to the employer to establish "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." *Id.* at 287 (footnote omitted). The district court's conclusion that when protected speech is a "motivating factor" what would have happened in the absence of that speech is "not germane to the question of liability" is accordingly untenable. The district court may have confused the standards *Mt. Healthy* establishes for constitutional litigation with the standards in some other kinds of employment litigation. See 42 U.S.C. §2000e-2(m) (added by the Civil Rights Act of 1991). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Whatever may be the case under labor and civil rights statutes, *Mt. Healthy* establishes the approach for litigation under the first amendment.

At oral argument the question arose whether *Mt. Healthy* is limited to cases in which an employer *concedes* basing its decision in part on protected speech. Although the employer made such a concession in *Mt. Healthy*, nothing in the Court's rationale depends on that fact. Indeed, if the employer's concession were vital, one wonders why the Court said that the plaintiff bears the initial burden

of *proving* that protected speech is a motivating factor. Decisions in this circuit since *Mt. Healthy* apply its approach to circumstances in which employers took the same tack as Warden Neal: denying that they reacted adversely to the employee's speech and insisting that, if the jury nonetheless concludes that speech played a role, other considerations would have produced the same decision anyway. E.g., *Rakovich v. Wade*, 850 F.2d 1180, 1188-99 (7th Cir. 1988) (en banc) (concluding that defendant prevailed under *Mt. Healthy* because plaintiff had not established that protected speech was a motivating factor); *Greenberg v. Kmetko*, 840 F.2d 467, 474-75 (7th Cir. 1988) (en banc) (directing district court to give a *Mt. Healthy* instruction in a case in which the defendants considered plaintiff's speech but denied that the speech was protected by the Constitution).

Many defendants do not want *Mt. Healthy* instructions and prefer to ask an either-or question of the jury. This is especially so when, as in *Greenberg* and *American Postal Workers Union v. United States Postal Service*, 830 F.2d 294, 311 n.28 (D.C. Cir. 1987), the employer concedes taking adverse action on the basis of an employee's speech but contends that the speech was not protected by the first amendment. *Mt. Healthy* is something of a misfit in such circumstances (although *Greenberg* relied on it). When, however, the plaintiff says that the adverse decision was based on speech, and the defendant says that the decision was based on something else, the jury should be told what to do if it concludes that the employer had both motives. *Mt. Healthy* gives the jury that essential information.

The evidence was not so overbalanced that the error can be called harmless. Instructional error of this kind would be harmless only if the evidence so favored Gooden that a jury could not find by a preponderance of the evidence that the constructive discharge was attributable to matters other than protected speech. The district judge, who submitted the case to the jury, did not think the evidence so lopsided. Gooden had a lot going for him—

the awards and letters of praise, the odd manner of his removal, the accumulation of what appear to be trumped-up charges after March 1987 to justify assigning a lieutenant as a regular guard, the testimony of Charles Newman (a founding editor of *Criminology*) that Gooden behaved appropriately and that nothing in his personnel file or the records of his investigation reflected otherwise, and Gooden's own testimony that one of the defendants told him that he had been banished for "starting to make waves within the institution." But the defendants testified that they viewed Gooden's behavior as erratic and insubordinate, and a prison is enough like a military institution that jurors could believe that a subordinate *viewed* as a trouble-maker is on the way out no matter what he said (and no matter whether the view is accurate). Defendants will have an uphill fight on this record, even with a properly instructed jury, but they are entitled to have the jury's decision on the factual questions rather than ours.

Gooden raised a state-law claim under the supplementary jurisdiction. Illinois encourages reports of crime and forbids employers to retaliate against employees who make such reports. 20 ILCS 415/19c.1; *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Belline v. K-Mart Corp.*, 940 F.2d 184 (7th Cir. 1991). The district court removed this claim from the jury's consideration on a motion by Gooden that the court encouraged him to make, believing that it was redundant in light of the first amendment theories. As this opinion shows, however, the court's belief is incorrect. To prevail under state law Gooden did not have to establish that his reports were protected speech, and the tort of retaliatory discharge in Illinois has not developed in precisely the same way as constitutional torts governed by *Mt. Healthy*. State and federal theories are distinct; Gooden could win under one and lose under the other. At any new trial Gooden therefore should have the opportunity to present both theories if he desires.

REVERSED AND REMANDED

LAY, *Circuit Judge*, dissenting.

I must respectfully dissent.

The vacation of the judgment and remand for a new trial create multiple degrees of unfairness. In the immediate case, a defendant reaps gain by claiming error in the trial court's refusal to instruct on a factual premise not involved in the case. For employers in general, however, the victory is certainly a Pyrrhic one. Assuming the majority's unprecedented ruling withstands further review, employment cases involving the First Amendment will require employers, in every case, to assume the burden of proving that their employment decisions were *not* based on the exercise of their employees' First Amendment rights. This new rule[1] flows from a misapplication of the Supreme Court's rulings in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

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[1] Prior to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Seventh Circuit applied *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), to all First Amendment political affiliation cases. *See McMillian v. Svetanoff*, 878 F.2d 186, 190 n.3 (7th Cir. 1989) (Flaum, J.). In *Price Waterhouse*, the Supreme Court applied the *Mt. Healthy* framework to a Title VII case; thus, *Mt. Healthy* clearly is not limited to First Amendment cases. *See id.* The Supreme Court distinguished between pretext cases, where the *McDonnell Douglas/Burdine* framework applies, and mixed-motive cases, where *Mt. Healthy* applies. *See id.*; *Price Waterhouse*, 490 U.S. at 247 n.12. In light of the Supreme Court's distinction, this court recognized that it was now questionable whether *Mt. Healthy* should apply to all political discrimination cases and acknowledged that perhaps *Mt. Healthy* applies only to mixed-motive political discrimination cases, and *McDonnell Douglas/Burdine* applies to pretext political discrimination cases. *McMillian*, 878 F.2d at 190 n.3. The *McMillian* court left for another day the decision on this question, and today this court reaches the untenable conclusion that *Mt. Healthy* applies to all First Amendment cases, regardless of whether they involve pretext or mixed motive.

Regardless of whether an employer is accused of retaliating against an employee for his or her exercise of the right of free speech, or of firing or demoting an employee because of his or her race or gender, one of two factual scenarios is involved. These scenarios have become commonly referred to as "pretext" and "mixed" or "dual" motive cases. Where pretext is implicated, the trier of fact is faced with an "all or nothing" situation. For example, the employee claims that she was fired as a result of her protected speech or for racial reasons, while the employer contends that such factors had nothing to do with the firing. One or the other is telling the truth, and the trier of fact must choose.

Pretext cases are governed by the *McDonnell Douglas/Burdine* framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under *McDonnell Douglas/Burdine*, the employee has the burden of establishing a prima facie case, then the employer has the burden of presenting a legitimate, nondiscriminatory reason for its action, and finally the employee has the opportunity to show that the employer's explanation is merely a pretext. *See McDonnell Douglas*, 411 U.S. at 802-04; *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2746-47 (1993). The employee retains the burden of persuasion at all times. *See Hicks*, 113 S. Ct. at 2747. The employer merely has the burden of production once the employee has established a prima facie case. The employer does not have to prove that its actions were motivated by the legitimate, nondiscriminatory reasons. *See Burdine*, 450 U.S. at 254.

Mixed-motive cases arise when an employer admits that considerations of the employee's race or protected speech, for example, played a part in the employer's decision, but the employer claims that because of other, legitimate considerations, it would have reached the same employment decision anyway. Such a situation was first addressed by the Supreme Court in *Mt. Healthy City School District*

Board of Education v. Doyle, 429 U.S. 274 (1977). *Mt. Healthy* involved a public school teacher who claimed he had been discharged for exercising his free speech rights under the First Amendment. In refusing to rehire the teacher, the school board based its decision on two incidents: the teacher phoned a radio station about a school matter, and the teacher made obscene gestures towards female students. *See id.* at 282-83. The district court made a finding of fact that the phone call to the radio station was " 'clearly protected by the First Amendment.' " *Id.* at 283.

The district court determined, and the court of appeals agreed, that the teacher's exercise of his right of free speech played a substantial part in the board's refusal to rehire him, and ordered that the teacher be reinstated. As a result of the reinstatement, the teacher would receive tenure. The school board was denied the opportunity to show that, because of other conduct engaged in by the teacher, it would have refused to rehire the teacher even if he had not spoken on the radio. *See id.* at 286. The rule enunciated by the district court had the effect of enabling someone who was about to be fired to retain his or her job simply by also exercising his or her right of free speech. The Supreme Court did not wish to "place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing," *id.* at 285, and reasoned that such an employee "ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record." *Id.* at 286.

For this reason the Supreme Court held that where mixed motives are implicated, once an employee has shown that his or her constitutionally protected speech was a "substantial" or "motivating factor" in the adverse treatment of the employee by the employer, the burden shifts to the employer to prove "by a preponderance of the evidence that it would have reached the same decision as to [the employee] even in the absence of the protected

conduct." *Id.* at 287. Thus, where mixed motives are involved, the burden of persuasion, not simply the burden of production, shifts to the employer. In a mixed-motive situation, the employer has admitted that it considered illegitimate factors, and thus it is fair to put a heavier burden on the employer as compared to the pretext situation, where the employer denies any wrongdoing. *See Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring) (employer should not be "entitled to the same presumption of good faith where there is direct evidence that it has placed substantial reliance on factors whose consideration is forbidden by Title VII").

The majority acknowledges the facts involved in *Mt. Healthy*, but reasons that the consideration by the school board of permissible and impermissible factors was not of importance to the *Mt. Healthy* decision.[2] According to the majority, the Supreme Court did not rely on the mixed-motive situation in developing the *Mt. Healthy* framework.

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[2] This overlooks the Supreme Court's discussion of the district court's finding. The district court made the following conclusions on this aspect of the case:

> " '1) If a non-permissible reason, *e.g.*, exercise of First Amendment rights, played a substantial part in the decision not to renew—even in the face of other permissible grounds—the decision may not stand (citations omitted).
>
> "2) A non-permissible reason did play a substantial part. *That is clear from the letter of the Superintendent immediately following the Board's decision, which stated two reasons—the one, the conversation with the radio station clearly protected by the First Amendment.* A court may not engage in any limitation of First Amendment rights based on 'tact'—that is not to say that the 'tactfulness' is irrelevant to other issues in this case.' "

Mt. Healthy, 429 U.S. at 284-85 (emphasis added). The district court further stated that " '[i]n fact, as this Court sees it and finds, both the Board and the Superintendent were faced with a situation in which there did exist in fact reason . . . independent of any First Amendment rights or exercise thereof, to not extend tenure.' " *Id.* at 285.

This reading of *Mt. Healthy* ignores the plain language of the case. If *Mt. Healthy* had involved a pretext situation, the Supreme Court likely would not have reversed. It was precisely *because* the school board admitted that it considered the phone call to the radio station, but argued that it would have reached the decision not to rehire the teacher even without the phone call, that the Court reversed the case. If the question had simply been whom to believe between the school board and the teacher, there would have been no need for a new trial.

In *Mt. Healthy* the Court indicated that the long-term consequences of tenure are so "significant" that it could not approve a rule that would prevent the school board that "*considered constitutionally protected conduct in deciding not to rehire [the teacher], from attempting to prove to a trier of fact that quite apart from such conduct [the teacher's] record was such that he would not have been rehired in any event.*" *Id.* at 286 (emphasis added). Thus, contrary to the majority's reasoning, the Court in restructuring the burden of proof did consider the fact that the employer had a mixed motive. The rationale of *Mt. Healthy* was that:

> [a] rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. . . . The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.

Id. at 285-86.

The majority interprets *Mt. Healthy* and free speech cases to be distinct from all other employment cases under Title VII or § 1983. This kind of categorization does not comport with logic. Although *Mt. Healthy* arose in the context of the First Amendment, it has not been limited to First Amendment situations. Indeed, in *Price Water-*

house v. Hopkins, 490 U.S. 228 (1989), a mixed-motive case involving gender discrimination, the Supreme Court applied the same analysis that was developed in *Mt. Healthy*.[3] The plaintiff in *Price Waterhouse* claimed that she was denied partnership in an accounting firm because of gender discrimination. The district court found that some of the partners' remarks, in evaluating the plaintiff, stemmed from impermissible gender stereotypes. *Id.* at 235-36.[4] The district court also found, however, that the accounting firm legitimately emphasized interpersonal skills and had not fabricated as a pretext for discrimination its complaints about the plaintiff's interpersonal skills. *Id.* at 236.

Of critical importance to the Supreme Court in deciding the standard to be applied in *Price Waterhouse* was the fact that it was a mixed-motive situation. *See id.* at 240 n.6 (comparing *Price Waterhouse* to *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n. 10 (1976), the Court pointed out that "*McDonald* did not involve mixed motives. This difference is decisive in distinguishing [*Price Waterhouse*] from those involving 'pretext.' "). Justice Brennan in the plurality opinion stated:

> Nothing in this opinion should be taken to suggest that a case must be correctly labeled as either a "pretext" case or a "mixed-motives" case from the beginning in the District Court; indeed, we expect that plaintiffs often will allege, in the alternative, that their

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[3] *See also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977) (in a decision handed down the same day as *Mt. Healthy* the Court found the *Mt. Healthy* standard applicable to a claim of racial discrimination in the denial of a rezoning proposal).

[4] For example, one partner described the plaintiff as "macho," another suggested she take " 'a course at charm school,' " a third told her that to improve her chances for partnership she should " 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.' " *Price Waterhouse*, 490 U.S. at 235 (quoting the district court opinion).

> cases are both. Discovery often will be necessary before the plaintiff can know whether both legitimate and illegitimate considerations played a part in the decision against her. At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives.

Id. at 247 n.12.

Similarly, Justice White in his concurrence stated that "[t]he Court has made clear that 'mixed-motives' cases, such as the present one, are different from pretext cases such as *McDonnell Douglas* and *Burdine*. In pretext cases, 'the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision.' " *Id.* at 260 (quoting *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 n.5 (1983)).

The relevant distinction is between mixed-motive and pretext cases, not between discrimination involving the First Amendment and all other types of discrimination. The D.C. Circuit Court of Appeals recognized this distinction in *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 830 F.2d 294 (D.C. Cir. 1987) [hereinafter *APWU*]. The plaintiff was a postal employee who was fired after writing an article in a union newsletter, in which he stated that he had read third class mail and found petitions mailed by a United States Congressman seeking support for "right to work" (anti-union) legislation. *Id.* at 297. The Postal Service contended that it fired the plaintiff for allegedly violating Postal Service regulations regarding reading mail. The district court found, and the D.C. Circuit agreed, that the Postal Service's reason was merely a pretext; the plaintiff offered a plausible explanation of his statements in the newsletter column, but the Postal Service fired the plaintiff "on the spot" without further investigation. *Id.* at 311.

The D.C. Circuit reasoned that because *APWU* involved a pretext situation, the full *Mt. Healthy* test was not ap-

propriate.[5] The *APWU* court held that the plaintiff had to prove that his protected speech was a motivating factor in the Postal Service's decision to fire him. *Id.* at 310-11. The court did not, however, proceed to shift the burden to the Postal Service to show that it would have fired the plaintiff in the absence of his protected speech. The D.C. Circuit reasoned that the significance of the fact that pretext, and not mixed motive, was involved "is that in this case, the court is not asked to reach the third part of the *Mt. Healthy* analysis; if [the plaintiff] shows that his speech was constitutionally protected and that it was a substantial or motivating factor in the decision to fire him, he must prevail." *Id.* at 311 n.28.

The Second Circuit Court of Appeals has similarly recognized that pretext analysis as developed in *McDonnell Douglas* and *Burdine* is not limited to Title VII cases but "is fully applicable to constitutional claims where the issue is whether an improper motive existed." *Howard v. Senkowski*, 986 F.2d 24, 27 n.2 (2d Cir. 1993). Similarly, mixed-motive analysis also applies in non-constitutional settings. *Id.* at 26 n.1 (citing, e.g., *Price Waterhouse*, 490 U.S. at 244-47; *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983) (National Labor Relations Act)).

The *Howard* court was faced with the question of what type of analysis to apply to a *Batson* challenge where the prosecutor conceded that race was a factor in his peremptory challenge decisions, but indicated that other factors were more significant. *Id.* at 25. The trial court applied the *McDonnell Douglas/Burdine* pretext framework, found

[5] The D.C. Circuit stated that "this case, unlike *Mt. Healthy*, is not a 'dual motive' case. The Postal Service does not contend that it *would have* fired [the plaintiff] for a permissible reason even in the absence of his protected speech; rather, it asserts that it *did* fire [the plaintiff] solely for the permissible reason that [the plaintiff] violated Postal Service regulations." *Id.* at 311 n.28 (citations omitted).

that the prosecutor had articulated legitimate explanations which were not pretextual, and concluded that the individual had not established purposeful discrimination by the prosecutor. *Id.* at 25-26. The Second Circuit decided, however, that because *Howard* involved mixed motive, a *Mt. Healthy* analysis should have been used instead. The critical distinction, as the Second Circuit sees it, is whether a pretext or mixed-motive situation is involved: the *Burdine* pretext analysis applies when "the issue is the all-or-nothing question of whether or not an impermissible consideration motivated the challenged action," whereas the *Mt. Healthy/Price Waterhouse* framework applies in mixed-motive scenarios. *Id.* at 27.

The Second Circuit recently faced, in a labor context, the argument that *Mt. Healthy* should apply to both pretext and mixed-motive situations. *See Holo-Krome Co. v. NLRB*, 954 F.2d 108 (2d Cir. 1992). The court discussed the differences between pretext and mixed-motive cases, and then turned to the standards used in civil rights litigation. *See id.* at 110. The Second Circuit did not distinguish between the framework to be used in civil rights and First Amendment cases; rather, it stated that *Burdine* applies to pretext cases and *Mt. Healthy* to mixed-motive cases. *Id.* The *Holo-Krome* court criticized the NLRB's position that *Mt. Healthy* should apply to both mixed-motive and pretext labor cases: "The Board's insistence that the two approaches need not be distinguished ignores the reality that they are different: pretext analysis determines what the true motivation actually was; dual motivation analysis determines what the employer's conduct would have been if the improper motivation had not been present." *Id.*

The majority's decision to shift the burden of persuasion to the employer, in *every* First Amendment case, is insupportable. It is incomprehensible why free speech cases will always place the burden of proof on the employers to show the legitimacy of discharge or other adverse employment decisions. Yet when race, gender, age, or nationality

enter into the employment decision, the burden of persuasion will not be placed on the employer unless the plaintiff can prove that the employer had a mixed motive in reaching its decision. Under the majority's approach, *Mt. Healthy* ends up benefiting a plaintiff by placing him or her in a better position than other employees, simply because the claim made relates to the First Amendment rather than some other protected status. As a further consequence of today's decision, it seems that in all First Amendment cases the employee is relieved of the burden of showing pretextuality; the traditional burden of proof as to causation will have already been transferred to the employer at the pleading stage.[6]

The majority states that the district court did not discuss the *Mt. Healthy* standard. The district court clearly was aware, however, of the defendant's belated claim of mixed motive.[7] The district court pointed out to the defendants that they had not tried the case on a mixed-motive basis. Judge Baker ruled that the burden shifting part

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[6] Under the majority's rule, all First Amendment cases transfer the burden of proof to the employer to show that the employer would have made the same employment decision even in the absence of the protected conduct. Thus, at the pleading stage, as long as First Amendment violations are alleged, the burden will have already transferred, even in pretext cases. This is contrary to Justice Brennan's guidance in *Price Waterhouse*, where he recognized that it may not immediately be apparent whether a case involves pretext or mixed motive and that discovery may be necessary for the plaintiff to make this determination. *See Price Waterhouse*, 490 U.S. at 247 n.12. Now discovery is no longer necessary, for the burden has already transferred to the employer.

[7] The defendants did not plead any "affirmative defense" that although speech may have been a motivating factor in the treatment of the plaintiff, his discharge would have occurred notwithstanding the employee's exercise of his free speech rights. The first time the defendants raised the *Mt. Healthy* claim was in the instruction conference at the close of all of the evidence.

of *Mt. Healthy* did not apply.[8] There exists a basic principle that district courts apply in every instruction conference: Judges do not instruct on legal principles where factual proof to support the claim is absent. *See, e.g., Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1297 (10th Cir. 1989) (error under federal law to give instruction when there is no evidence to support it); *DMI, Inc. v. Deere & Co.*, 802 F.2d 421, 429 (Fed. Cir. 1986) (although proffered jury instruction may be valid as an abstract proposition, it cannot be given where no evidence was produced at trial relating to it); *see also General Leaseways, Inc. v. National Truck Leasing Ass'n*, 830 F.2d 716, 725 (7th Cir. 1987) (instructions must be viewed "in light of the allegations of the complaint, opening and closing arguments and the evidence of record"); *Rogers v. ACF Indus., Inc.*, 774 F.2d 814, 818 (7th Cir. 1985) (party is entitled to have its theory of the case presented to the jury if there was evidence to support it).

The defendants did not try this case on a mixed-motive basis. From the opening statement and throughout the trial, they urged that they either did not know or did not care that Gooden was going to the state's attorney. The defendants simply denied that Gooden's disclosure to the state's attorney had any impact whatsoever on their decisions. The defendants presented this as a pretext case, and the district court properly so instructed by eliminating the third prong of *Mt. Healthy*.

Under the circumstances, depriving the plaintiff of the verdict and ordering a new trial is totally unwarranted. The judgment of the district court, based on the jury verdict, should be affirmed.

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[8] Judge Baker responded to counsel's request for the full *Mt. Healthy* instruction by stating: "I don't disagree with all those hypothetical discussions of the law. Given proper facts and evidence they might have application, but, in this case, I rule that it does not."

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APPENDIX B

Judgment of the Court of Appeals
Entered on February 7, 1994

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: February 7, 1994

Before Hon. Richard A. Posner, Chief Judge
Hon. Donald P. Lay, Circuit Judge*
Hon. Frank H. Easterbrook, Circuit Judge

No. 92-2524

JAMES GOODEN,
Plaintiff-Appellee

v.

MICHAEL V. NEAL, RANDY TINSMAN, PAUL BARNETT, et al.,
Defendants-Appellants

Appeal from the United States District Court for the Central District of Illinois, Danville Division No. 87 C 2460, Harold A. Baker, Judge

The judgment of the District Court is REVERSED, with costs, and the case is REMANDED, in accordance with the decision of this court entered on this date.

* Hon. Donald P. Lay, of the Eighth Circuit, sitting by designation.

(1061-110393)

APPENDIX C

Amended Judgment of the Court of Appeals Entered on February 25, 1994

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

AMENDED JUDGMENT - WITH ORAL ARGUMENT
Date: February 7, 1994
Amended Date: February 25, 1994

Before Honorable Richard A. Posner, Chief Judge
Honorable Donald P. Lay, Circuit Judge*
Honorable Frank H. Easterbrook, Circuit Judge

No. 92-2524

JAMES GOODEN,
Plaintiff-Appellee
v.

MICHAEL V. NEAL, RANDY TINSMAN, PAUL BARNETT, et al.,
Defendants-Appellants

Appeal from the United States District Court for the Central District of Illinois, Danville Division No. 87 C 2460, Harold A. Baker, Judge

The judgment of the District Court is REVERSED and the case is REMANDED, in accordance with the decision of this court entered on this date. Each side shall bear its own costs.

---

* The Honorable Donald P. Lay, Circuit Judge of the Eighth Circuit, sitting by designation.
(1061-110393)

APPENDIX D

Order Denying Petition for Rehearing Entered on March 7, 1994

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 7, 1994

Before

Hon. Richard A. Posner, Chief Judge
Hon. Donald P. Lay, Circuit Judge*
Hon. Frank H. Easterbrook, Circuit Judge

JAMES GOODEN, Plaintiff-Appellee, No. 92-2524 v. MICHAEL V. NEAL, et al., Defendants-Appellants.	) Appeal from the) United States) District Court) for the Central) District of Illinois,) Danville Division.)) No. 87-2460) Harold A. Baker,) Judge

Order

Plaintiff-Appellee filed a petition for rehearing and suggestion of rehearing en banc on February 22, 1994. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Hon. Donald P. Lay, of the Eighth Circuit, sitting by designation.

APPENDIX E

Amended Judgment of the District Court Entered on May 23, 1991

U.S. DISTRICT COURT-CENTRAL DIST.
FILED
MAY 23 1991
JOHN M. WATERS, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
DANVILLE DIVISION

JAMES GOODEN,	)	AMENDED
	)	JUDGMENT IN A CIVIL CASE
vs.	)	
	)	
MICHAEL NEAL, et al.	)	CASE NUMBER: 87-2460

[x] **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant Augustus Scott is dismissed with prejudice.

[x] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiff and against the defendants, Michael V. Neal, Randy Tinsman, Paul Barnett and Dennis Davis in the sum of $375,000.00 plus costs of suit.

May 23, 1991
Date

John M. Waters
Clerk
Sheryl L. Toler
(By) Deputy Clerk

APPENDIX F

Order of the District Court
On Defendants' Motion for Judgment [N.O.V.]
Or in the Alternative for a New Trial
Entered on May 20, 1992

U.S. DISTRICT COURT-CENTRAL DIST.
FILED
MAY 20 1991
JOHN M. WATERS, Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JAMES GOODEN,	)	
	)	
Plaintiff,	)	No. 87-cv-2460
	)	
vs.	)	
	)	
MICHAEL NEAL, et al.	)	
	)	
Defendants.	)	

ORDER ON DEFENDANTS' MOTIONS
FOR JUDGMENT [N.O.V.]
OR IN THE ALTERNATIVE FOR A NEW TRIAL

James Gooden was a corrections lieutenant who worked at the Danville medium security prison in the Illinois Department of Corrections. He thought of himself as a "whistle blower" who reported what Gooden perceived as wrongful conduct to the county state's attorney. As a result, Gooden contended, he was disciplined and assigned to jobs that finally forced him to quit. The defendants, on the other hand, viewed Gooden as a trouble maker with a twisted view of proper prison administration. Gooden's transfer from Internal Affairs Officer to a job patrolling the institution perimeter in the middle of winter, the defendants argued, was not in retaliation for Gooden's reports to the state's attorney but the best way they had to handle the

personnel problem that Gooden presented. The jury believed Gooden and didn't believe the defendants and awarded Gooden $375,000 in compensatory damages and no punitive damages. Judgement was entered in favor of the plaintiff and against the defendants Michael V. Neal, Randy Tinsman, Paul Barnett and Dennis Davis. Those defendants have moved the court to enter judgment in their favor and against the plaintiff notwithstanding the jury's verdict or in the alternative for a new trial or for a remittitur. For the reasons hereinafter assigned, each motion is denied.

I.

The defendants first argue that Gooden's speech wasn't protected. The court rejects that argument because the policy in Illinois that upholds the enforcement of a state's criminal code and encourages disclosure of wrong to the prosecutor demonstrates the public nature of Gooden's speech. *Palmateer v. International Harvester Co.*, 85 Ill.2d 124 (1981). In ruling that the speech was of a public nature and protected, the court met the requirements of *Connick v. Meyers*, 461 U.S. 138 (1983).

The defendants also argue that the court failed to apply the analysis required by *Pickering v. Board of Education*, 391 U.S. 563 (1968): *i.e.*, to balance the needs of the administration of the prison against the public concern with the enforcement of the criminal law; and to consider whether Gooden's charges were made falsely and recklessly. That contention is disposed of by *the discussion in O'Brien v. Town of Caledonia*, 748 F.2d 403, 407 (7th Cir. 1984). Applicable to this case, the court said:

> The limitations on the *Pickering* balancing test expressed in *Connick v. Meyers*, 461 U.S. 138 (1983), do not alter our conclusion. In *Connick* the Court emphasized the government's legitimate interest in controlling employee's communications which are disruptive of internal operations. Furthermore, the public's interest in the subject matter of the communication was deemed to be of limited weight when the topic was primarily a private concern of the employee. Neither of these considerations weigh against O'Brien in this case. The evidence indicates that O'Brien took his concerns to the appropriate external authorities and any disruption caused thereby must be accepted as incidental. Furthermore, as discussed previously, the subject matter of O'Brien's disclosure was of great public interest and cannot be considered to have been dominated by the co-existing private concern, *i.e.* O'Brien's retention of his employment.

Gooden's exposure to proper external authority of what Gooden perceived to be criminal conduct at the prison falls precisely into the ambit of the protected conduct described in *O'Brien*.

II.

The defendants also say that they are entitled to judgment because they are protected by qualified immunity. That too is not a correct assessment. Without going into the defendants' waiver of the affirmative defense of qualified immunity, (it was not argued before this motion) the rights asserted here were established long before the occurrences which underlie this case. *Pickering v. Board of Education*, 391 U.S. 563 (1968) held that:

> A public employee does not give up his constitutional rights as a condition of his employment. As a general rule, a public employee's exercise of his right to speak out on matters of public concern may not subject him to dismissal from employment. Id at 574.

In 1981 Illinois codified the right of a public employee to be free from acts of retaliation for reporting wrongful conduct by public officials to the state's attorney. Ill.rev.Stat. ch. 127, para. 63b119c.1 (1981). Any extended discussion of this point is not warranted.

III.

The defendants next point is that the jury's verdict is not supported by the evidence. That argument also has no merit. The test for granting judgment notwithstanding the verdict is set out in the recent case of *Garrett v. Barnes*, 1992 U.S.App. LEXIS 6357 (7th Cir. 1992).

> A judgment n.o.v. [or directed verdict] should be denied "'where the evidence, along with the inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the party opposing such motion is such that reasonable men in a fair and impartial exercise of their judgment may reach different conclusions.'" [citations omitted] Implicit in this standard is a recognition that a jury verdict must be allowed to stand if it is supported by circumstantial evidence. A judgment n.o.v. [or directed verdict] is proper, however, if the verdict is supported only by "sheer speculation and conjecture." [citation omitted] citing *McClure v. Cywinski*, 686 F.2d 541, 544 (7th Cir. 1982).

There was evidence from which the jury could have found that the defendants, Tinsman, Davis, Barnett and Neal, individually and collectively took retaliatory actions against the plaintiff because he was critical of their activities and reported suspected unlawful conduct to the Vermilion County States Attorney. The evidence showed that Davis was involved in the incidents of gang activity reported to the states attorney. Davis assigned Gooden to the tool room and was his supervisor in the period of time leading up to Gooden's assignment to the fence patrol. Tinsman was involved in Gooden's reassignments and brought some of the administrative charges against Gooden. Neal and Barnett, of course, were Gooden's supervisors and as warden and assistant warden of the prison they were personally involved in the actions taken against Gooden. Whether Gooden was constructively discharged was a fact specific inquiry for the jury, and the jury acted reasonably when it found that he was. See *Thomas v. Maurice Sporting Goods, Inc.*, 686 F.Supp. 208, 212 (N.D. Ill. 1988). Viewed in the light most favorable to the plaintiff, putting Gooden on fence patrol during the winter was a thinly veiled scheme to get him to quit.

Finally the defendants argue that as a matter of law Gooden's reports to the states attorney were reckless and false and that the court should rule that the reports were made for purposes of harassment. The jury didn't believe that and there is no basis for the court to make such a ruling about Gooden's reports. The states attorney, DeArmond, apparently took the reports seriously. The defendants had their chance to argue the reckless and false nature of the charges to the jury and the jury wasn't persuaded by those arguments.

IV.

In the alternative to a judgment as a matter of law the defendants have asked for a new trial or a remittitur. A new trial can be given when the court concludes that some error occurred in the trial that deprived the defendants of a fair trial or the verdict is against the clear weight of the evidence. The court cannot grant a new trial merely because it disagrees with the jurors' assessment of the evidence or their credibility determinations. See generally Wright & Miller, Federal Practice and Procedure: Civil, sec. 2805.

The court's instructions on the First Amendment were correct. The jury was told that the protected speech had to be a *motivating factor* in the actions taken by the defendant. See *Ohse v. Hughes*, 816 F.2d 1144 (7th Cir. 1987). If the protected speech was a motivating factor and a constitutional violation, the fact that the defendants would have done what they did anyway, without being motivated by the protected speech, is not germane to the question of liability.

The defendants' argument about "front pay" is hard to understand. The jury was instructed on lost wages and benefits past and future. That was what the evidence supported and what the plaintiff was entitled to recover under sec. 1983. "Front pay" is a term that applies to a Title VII case under sec. 2000e but has no application in this case.

The jury's award of damages was within the evidence presented through the witness Hoyt. Hoyt showed Gooden's lost past income and benefits and projected his

lost future income and benefits. The jury fixed the damages within those projections. For those same reasons a remittitur is not appropriate.

The court is not persuaded by the defendants' argument that there was a reversible error in the admission of certain evidence. Each of the court's rulings is discussed in the record.

It is therefore ordered that the defendants' Neal, Tinsman, Barnett and Davis, motions for judgment as a matter of law or in the alternative for a new trial or a remittitur are each denied.

Enter, this 20th day of May, 1992.

Harold A. Baker
United States District Judge

APPENDIX G

Rule 16, Federal Rules of Civil Procedure (Pertinent Sections and Commentary to 1983 Amendment)

Federal Rules of Civil Procedure, Rule 16

Rule 16. Pretrial Conferences; Scheduling; Management

(a) **Pretrial Conferences; Objectives.** In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation, and;

(5) facilitating the settlement of the case.

* * * * *

(c) **Subjects for Consideration at Pretrial Conferences**. At any conference under this rule consideration may be given, and the court may take appropriate action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

* * * * *

(e) **Pretrial Orders**. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order

following a final pretrial conference shall be modified only to prevent manifest injustice.

* * * * *

1983 AMENDMENT

* * * * *

Subdivision (c); Subjects to be Discussed at Pretrial Conferences. This subdivision expands upon the list of things that may be discussed at a pretrial conference that appeared in original Rule 16. The intention is to encourage better planning and management of litigation. Increased judicial control during the pretrial process accelerates the processing and termination of cases. Flanders, *Case Management and Court Management in United States District Courts*, Federal Judicial Center (1977). See also *Report of the National Commission for the Review of Antitrust Laws and Procedures* (1979).

The reference in Rule 16(c)(1) to "formulation" is intended to clarify and confirm that court's power to identify the litigable issues. It has been added in the hope of promoting efficiency and conserving judicial resources by identifying the real issues prior to trial, thereby saving time and expenses for everyone. See generally *Meadow Gold Prods. Co. v. Wright*, 278 F.2d 867 (D.C. Cir.1960). The notion is emphasized by expressly authorizing the elimination of frivolous claims or defenses at a pretrial conference. There is no reason to require that this await a formal motion for summary judgment. Nor is there any reason for the court to wait for the parties to initiate the process called for in Rule 16(c)(1).

The timing of any attempt at issue formulation is a matter of judicial discretion. In relatively simple cases, it

may not be necessary or may take the form of a stipulation between counsel or a request by the court that counsel work together to draft a proposed order.

Counsel bear a substantial responsibility for assisting the court in identifying the factual issues worthy of trial. If counsel fail to identify an issue for the court, the right to have the issue tried is waived. Although an order specifying the issues is intended to be binding, it may be amended at trial to avoid manifest injustice. See Rule 16(e). However, the rule's effectiveness depends on the court employing its discretion sparingly.

* * * * *

Subdivision (e); Pretrial Orders. Rule 16(e) does not substantially change the portion of the original rule dealing with pretrial orders. The purpose of an order is to guide the course of the litigation and the language of the original rule making that clear has been retained. No compelling reason has been found for major revision, especially since this portion of the rule has been interpreted and clarified by over forty years of judicial decisions with comparatively little difficulty. See 6 Wright & Miller, *Federal Practice and Procedure: Civil §§1521-30 (1971)*. Changes in language therefore have been kept to a minimum to avoid confusion.

Since the amended rule encourages more extensive pretrial management than did the original, two or more conferences may be held in many cases. The language of Rule 16(e) recognizes this possibility and the corresponding need to issue more than one pretrial order in a single case.

Once formulated, pretrial orders should not be changed lightly; but total inflexibility is undesirable. See,

e.g., Clark v. Pennsylvania R.R. Co., 328 F.2d 591 (2d Cir. 1964). The exact words used to describe the standard for amending the pretrial order probably are less important than the meaning given them in practice. By not imposing any limitation on the ability to modify a pretrial order, the rule reflects the reality that in any process of continuous management what is done at one conference may have to be altered at the next. In the case of the final pretrial order, however, a more stringent standard is called for and the words, "to prevent manifest injustice," which appeared in the original rule, have been retained. They have the virtue of familiarity and adequately describe the restraint the trial judge should exercise.

Many local rules make the plaintiff's attorney responsible for drafting a proposed pretrial order, either before or after the conference. Others allow the court to appoint any of the attorneys to perform the task, and other leave it to the court. See Note, *Pretrial Conference: A Critical Examination of Local Rules, Adopted by Federal District Courts*, 64 Va.L.Rev. 467 (1978). Rule 16 has never addressed this matter. Since there is no consensus about which method of drafting the order works best and there is no reason to believe that nationwide uniformity is needed, the rule has been left silent on the point. See *Handbook for Effective Pretrial Procedure*, 37 F.R.D. 225 (1964).

APPENDIX H

Respondents' Proposed Jury Instruction No. 15

Respondents' Proposed Jury Instruction No. 15

In order to find a defendant liable for violating the first amendment free speech rights of the plaintiff, the plaintiff must prove each of the following six propositions by a preponderance of the evidence, considering each defendant separately:

First, that plaintiff spoke to the state's attorney of Vermilion County regarding activities at the Danville Correctional Center;

Second, that defendant became aware of plaintiff's speech;

Third, that after becoming aware of plaintiff's speech, defendant took some significant action against plaintiff;

Fourth, that plaintiff's speech was a substantial and motivating factor for the action taken by the defendant;

Fifth, that plaintiff suffered damages; and

Sixth, that the defendant's conduct was a proximate cause of the plaintiff's damages.

If you find that plaintiff has failed to prove any one of the above propositions by a preponderance of the evidence, then you should find in favor of the defendant under consideration and against the plaintiff.

On the other hand, if you find that plaintiff has proved each of the above six propositions by preponderance of the evidence, then you must determine whether the defendant has proved by a preponderance of the evidence that he would have taken the action against plaintiff regardless of whether plaintiff spoke to the Vermilion County State's Attorney.

If you find that the defendant has proved by a preponderance of the evidence that he would have taken the action regardless of plaintiff's speech, then you should find for the defendant under consideration and against the plaintiff. On the other hand, if you find that plaintiff has proved by a preponderance of the evidence each of the above six factors, and that defendant has failed to prove by a preponderance of the evidence that he would have taken the action against plaintiff regardless of plaintiff's speech, then you should find for the plaintiff and against the defendant under consideration.

(R. Doc. 60, at No. 15; R. 1192-98.)

APPENDIX I

The District Court's Jury Instruction No. 14

The District Court's Jury Instruction No. 14

To prove his claim of violation of his rights of free speech under the First Amendment, the plaintiff has the burden of proving each of the following propositions, considering each defendant separately:

First, that the plaintiff was employed as a corrections officer at the Danville Correctional Center in July, 1985; and

Second, that the plaintiff made oral reports to the State's Attorney of Vermilion County about activities at the Danville Correctional Center; and

Third, that the defendant under consideration retaliated against the plaintiff and that the reports to the State's Attorney were a substantial or motivating factor for the retaliation; and

Fourth, that the plaintiff was forced out of his job and suffered damages; and

Fifth, that the defendant's conduct was a proximate cause of the plaintiff's damages.

If you find from your consideration of all the evidence that each of the five propositions has been proved, then you should find in favor of the plaintiff and against the defendant under consideration.

On the other hand, if you find that any one of the propositions has not been proved, then you should find in favor of the defendants under consideration and against the plaintiff.

(R. Doc. 62, at 14; R. 1298-99.)